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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RAY MARSHALL, SECRETARY OF LABOR,
Petitioner

v.

STATE OF ALABAMA AND STATE OF NEVADA,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONSE OF STATES OF ALABAMA AND NEVADA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI AND MOTION OF STATES OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO 80-120

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QUESTIONS PRESENTED

1. Whether the United States Secretary of Labor erred in interpreting section 3309 of the Federal Unemployment Tax Act to require the extension of state unemployment compensation laws to church elementary and secondary schools, when the plain language of section 3309(b)(1) exempts such schools from coverage, there is no evidence that Congress intended coverage of such schools, and coverage presents serious constitutional problems under the Religion Clauses of the First Amendment.

2. Whether the United States Secretary of Labor's decision requiring the extension of state unemployment compensation laws to church elementary and secondary schools would result in excessive governmental entanglement with religion in violation of the Religion Clauses of the First Amendment.

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RESPONSE OF STATES OF ALABAMA AND NEVADA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The United States Secretary of Labor has filed a petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. That court set aside the Secretary's ruling that section 3309(b)(1) of the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3311 ("FUTA"), requires church elementary and secondary school employees to be covered under state unemployment compensation laws. *States of Alabama & Nevada* v. *Marshall*, 626 F.2d 366 (5th Cir. 1980).

Proceedings in this case were instituted when the Secretary of Labor notified Alabama and Nevada pursuant to section 3304(d) of FUTA that he intended to with-

hold certification from those States because they had not extended their unemployment compensation laws to persons performing services in church elementary and secondary schools. Alabama and Nevada contended that FUTA did not require coverage of employees in church schools and that such coverage would violate the Religion Clauses of the First Amendment.

After a hearing held in accordance with section 3304 (c) of FUTA, an Administrative Law Judge of the United States Department of Labor ruled that the Secretary of Labor's interpretation of FUTA was erroneous and recommended that Alabama and Nevada be certified. The Secretary of Labor rejected this recommendation, and Alabama and Nevada sought review in the United States Court of Appeals for the Fifth Circuit pursuant to the review provisions of section 3310 of FUTA. In addition to the States and the Secretary of Labor, participants in the Fifth Circuit proceedings included four major church groups and an organization of church school teachers.

The Fifth Circuit's ruling set aside the Secretary of Labor's decision on the basis that the plain language of section 3309(b)(1)(A) of FUTA exempts from coverage persons performing services in church elementary and secondary schools. 626 F.2d at 369. Citing this Court's decision in *NLRB* v. *Catholic Bishop*, 440 U.S. 490 (1979), the Fifth Circuit found no clear congressional intention to contradict the plain language of the statute.[1]

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[1] Consequently, the Court of Appeals stated:

> If Congress desires to change the established exemption of unemployment compensation coverage for elementary and secondary parochial school employees, it is well within its ability to amend the law to reflect that desire by drafting a clear statement to that effect. But it is not the responsibility or function of this court to perform linguistic gymnastics in

The decision of the Fifth Circuit is in accord with the decisions of the many other state and federal courts [2] that have ruled upon the Secretary of Labor's interpretation, with the sole exception of the decision of the Supreme Court of South Dakota, which held that Congress intended FUTA to cover employees in church elementary and secondary schools and that such coverage would not violate the First Amendment.[3] On November 3, 1980, this Court granted a petition for a writ of certiorari in the South Dakota case. *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota,* No. 80-120.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fifth Circuit and the decision of the Supreme Court of South Dakota, which this Court decided to review on November 3, 1980, rule upon the same basic issue—the validity of the Secretary of Labor's interpretation of

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order to upset the plain language of Congress as it exists today.

626 F.2d at 369.

[2] *See* Grace Brethren Church v. California, No. CV 79-93 MRP (C.D. Cal., June 2, 1980), *appeal dismissed,* No. 79-3784 (9th Cir., July 21, 1980); Lutheran Church-Missouri Synod v. Bowling, No. 501-78 (Ill. App. Ct., Oct. 1, 1980); Grace Lutheran Church v. North Dakota Empl. Sec. Bur., Civ. No. 9719 (N. Dak., June 20, 1980); Roman Catholic Church v. State of Louisiana, No. 13,541 (La. Ct. App., June 9, 1980); Catholic Diocese v. Labor & Indus. Rel. Comm., No. CV 179-745 cc (Mo. Cir. Ct., Mar. 28, 1980), *appeal docketed,* No. 31780 (Mo. Ct. App., Apr. 28, 1980); Begley v. Employment Sec. Dep't, No. 78-CVS-8531 (N.C. Super. Ct., Mar. 4, 1980) (notice of appeal filed Mar. 6, 1980); Employment Div. v. Archdiocese of Portland, 42 Ore. App. 421, 600 P.2d 926 (1979); Trinity Evangelical Lutheran Church v. Department of Indus. Rel., No. CV 78 500325-Mc (Ala. Cir. Ct., Jan. 29, 1979).

[3] In re Northwestern Lutheran Academy, 290 N.W.2d 845, 848-52 (S.D. 1980).

FUTA's requirements with respect to employees in church elementary and secondary schools. The States of Alabama and Nevada urge the Court to grant the petition for review in this case immediately and, as requested in the motion accompanying this response, to consolidate it for review with the case from the Supreme Court of South Dakota.

The States of Alabama and Nevada make this request, and oppose the Secretary's suggestion that the Fifth Circuit decision be held pending disposition of proceedings in No. 80-120, on the ground that resolution of the important issues raised by the Secretary's interpretation of FUTA will be advanced by full review on the merits of the proceedings from the Fifth Circuit. As more fully explained below, the comprehensive stipulated record of facts underlying the Fifth Circuit's ruling will greatly facilitate determination of the statutory and constitutional issues presented to the Court. In addition, the Fifth Circuit's decision, unlike that of the Supreme Court of South Dakota, is based upon a formal decision by the Secretary of Labor construing the relevant section of FUTA. Review of the Fifth Circuit's decision would bring the Secretary before the Court as a party defending the official administrative interpretation of the federal statute. Moreover, the ruling of the United States Court of Appeals for the Fifth Circuit and the ruling of the Supreme Court of South Dakota address different subsections of the provision of FUTA relevant to coverage of employees in church schools. Review of both rulings would give the Court a more complete understanding of the statutory issues and a fuller basis for its decision.

Alabama and Nevada therefore urge the Court to grant the petition for a writ of certiorari to the Fifth Circuit and to order this case consolidated for review with No. 80-120.

ARGUMENT

The States of Alabama and Nevada agree with Petitioner that the validity of the Secretary of Labor's interpretation of section 3309(b)(1) of FUTA should be resolved by this Court. The Secretary's interpretation requires all states to extend their unemployment compensation laws to services performed in church elementary and secondary schools as a condition to continued certification under FUTA. For states that have not acceded to the Secretary's instructions to cover church schools, hundreds of millions of dollars in federal funds essential to the administration of their unemployment compensation programs have been jeopardized.[4] The eligibility of private employers in these states to literally billions of dollars in tax credits is also at stake.[5] In addition, the decision of the Secretary has spawned litigation in courts across the country by church groups fearful of the effect of the Secretary's interpretation of FUTA. A definitive decision by this Court is clearly necessary to resolve the controversies caused by the Secretary of Labor's position.

In granting the petition for a writ of certiorari in *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota*, No. 80-120, this Court has already recognized the importance of the issues raised by the Secretary of Labor's interpretation of FUTA. The States of Alabama and Nevada submit that the Court should

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[4] *See* 29 U.S.C. §§ 49-49k; 42 U.S.C. §§ 501-504. The Secretary of Labor has instituted administrative proceedings against eight states, in addition to Alabama and Nevada, which have challenged his interpretation of FUTA's requirements respecting church schools. These states are California, Michigan, Ohio, Oregon, Tennessee, Texas, Washington and Wisconsin. The proceedings against these states are being held in abeyance by the Secretary pending this Court's determination of the validity of his interpretation.

[5] *See* 26 U.S.C. § 3302.

also grant the petition for a writ of certiorari in the instant case immediately and should consolidate it for review with the case from the Supreme Court of South Dakota.[6] Such action—as opposed to merely placing this case in a "hold" status pending disposition of the South Dakota proceedings, as suggested by the Secretary of Labor—would serve several important purposes.

First, resolution of the important statutory and constitutional issues raised by the Secretary of Labor's interpretation of FUTA would be greatly facilitated by review on the basis of the factual record developed in the case decided by the Fifth Circuit. The statutory issue before the Court—whether services performed in church elementary and secondary schools are within the plain language of section 3309(b)(1)[7]—requires a factual determination of the nature of the relationship among churches, their schools, teachers and other personnel in those schools. The constitutional issue that would be presented for decision if the Court were to adopt the Secretary of Labor's interpretation also requires a factual determination of the potential effect state unemployment

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[6] Alabama's and Nevada's motion for consolidation follows this response in support of the petition for a writ of certiorari. Consolidation of this case with the case from South Dakota would not significantly delay consideration of the latter case. If the Court grants the petition in this case before January 1, 1981, Petitioner's brief would be due no later than mid-February and the brief of Respondents would be due by mid-March. *See* Sup. Ct. Rule 35. Thus, this case could be calendared for argument with No. 80-120, and decided, before the end of this Term.

[7] Section 3309(b)(1) provides an exemption from coverage for services performed:

> in the employ of (A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches.

compensation laws would have on churches and their schools.

The majc portion of the comprehensive record underlying the decision of the Fifth Circuit was agreed upon by the Department of Labor and the States of Alabama and Nevada in administrative proceedings before the Department of Labor. The record describes in detail the organization and operation of church elementary and secondary school systems of the Baptist, Lutheran and Roman Catholic Churches in Alabama and Nevada. The nature of the relationship between churches and persons performing services in church schools is fully set forth. In addition, the record demonstrates in detail the impact that the Secretary's proposed extension of Alabama's and Nevada's unemployment compensation laws to church schools would have on the operation of churches and their schools. Given the comparatively limited factual findings in the South Dakota case,[8] which involved only two schools of one denomination, Alabama and Nevada believe that the Court's analysis of the issues raised by the Secretary of Labor's interpretation of FUTA would be enhanced by the broad, undisputed record underlying the decision of the Fifth Circuit.

Second, it is appropriate for the Court to review the Secretary of Labor's interpretation of FUTA in a case in which the Secretary participated and issued a formal decision interpreting the relevant statutory provision. FUTA charges the Secretary with responsibility for determining whether states are in compliance with its provisions and establishes special procedures for administrative and judicial review of the Secretary's determinations. 26 U.S.C. §§ 3304, 3310. The Secretary invoked FUTA's procedures in the proceedings against Alabama and Nevada, issued a formal decision embodying the

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[8] *See* Appendix C to Petition for a Writ of Certiorari to the Supreme Court of South Dakota in No. 80-120, at pp. A36-A40.

agency's interpretation of FUTA, and was a party at all stages of the proceedings. In contrast, the South Dakota case arose under provisions of state law when two church schools challenged the state unemployment agency's determination that they were covered by provisions of the South Dakota unemployment compensation statute, which is modeled upon section 3309(b)(1) of FUTA. *See In re Northwestern Lutheran Academy*, 290 N.W.2d 845, 847 (S.D. 1980). The Secretary of Labor issued no decision in that case and did not participate in the proceedings.

The Secretary of Labor contended before the Fifth Circuit that his administrative interpretation of FUTA is entitled to deference, and the same argument likely will be pressed before this Court. Alabama and Nevada submit that in considering the substantial questions arising from the Secretary's interpretation, the Court should have the Secretary of Labor before it as a party defending the formal decision setting forth the agency's position.[9]

Finally, the Fifth Circuit and the Supreme Court of South Dakota interpreted different subsections of section 3309(b)(1) of FUTA, and resolution of the proper interpretation of the statute would be assisted by having both decisions before the Court for review. The Supreme Court of South Dakota ruled that employees working in

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[9] The United States filed a memorandum as amicus curiae supporting the petition for a writ of certiorari in the case from the Supreme Court of South Dakota and can be expected to proceed as amicus curiae on the merits, and to seek leave to present oral argument, in that case. Alabama and Nevada submit that if the United States—Petitioner through the Secretary of Labor in the instant case—is to present oral argument before the Court, in fairness, Respondents Alabama and Nevada should also have this opportunity. Granting the petition for a writ of certiorari to the Fifth Circuit would enable both the United States and the States of Alabama and Nevada to present argument to the Court as parties.

church schools are not within the exemption from coverage provided in section 3309(b)(1)(B) applicable to service performed in the employ of organizations which are, *inter alia*, "operated primarily for religious purposes." [10] The South Dakota Supreme Court did not expressly consider or rule upon the alternative exemption in section 3309(b)(1)(A) for services performed "in the employ of . . . a church or convention or association of churches." The United States Court of Appeals for the Fifth Circuit based its decision on the conclusion that employees performing services in church schools are within the plain language of the latter exemption.[11] Consolidation of both cases for review will thus give the Court a more complete basis on which to consider and decide upon the proper interpretation of FUTA.

CONCLUSION

The Secretary of Labor's decision that FUTA requires state unemployment compensation laws to cover employees working in church elementary and secondary schools raises statutory and constitutional issues affecting every state and major church group in the United States. For

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[10] The South Dakota Supreme Court then considered and decided the issue of the constitutionality of the Secretary's interpretation under the Religion Clauses of the First Amendment. *See* 290 N.W.2d at 849-52.

[11] Another difference between the case from the Supreme Court of South Dakota and the case from the United States Court of Appeals for the Fifth Circuit is that the latter presents the perspective of states which have challenged the Secretary of Labor's interpretation of FUTA. As previously noted, such states and employers within them stand to lose billions of dollars in benefits and tax credits as a result of their refusal to comply with the Secretary's instructions to cover employees in church schools. *See* notes 4-5, *supra*, and accompanying text. Granting a writ of certiorari in the case from the Fifth Circuit will assure that the substantial interests of such states are fully represented.

the reasons set forth above, Alabama and Nevada submit that the Court's consideration and resolution of these important issues would be substantially aided by reviewing the decision of the United States Court of Appeals for the Fifth Circuit in *States of Alabama & Nevada* v. *Marshall.* Alabama and Nevada thus respectfully urge the Court to grant the petition for a writ of certiorari filed by the Secretary of Labor in this case and, as requested in the following motion, to consolidate it for review with *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota,* No. 80-120.

Respectfully submitted,

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MOTION OF STATES OF ALABAMA AND NEVADA FOR CONSOLIDATION WITH NO. 80-120

Pursuant to Rules 37.3 and 42 of this Court's Rules, the States of Alabama and Nevada hereby move the Court for consolidation of this case for review with *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota,* No. 80-120. The petition for a writ of certiorari in the latter case was granted on November 3, 1980. The basis for this motion is that the decision of the Supreme Court of South Dakota and the decision of the United States Court of Appeals for the Fifth Circuit rule upon the same basic issue—the validity of the

Secretary of Labor's interpretation of section 3309(b)(1) of the Federal Unemployment Tax Act to require coverage of employees in church elementary and secondary schools under state unemployment compensation laws.

As more fully explained in the foregoing Response of States of Alabama and Nevada in Support of the Petition for a Writ of Certiorari, this Court's joint consideration of the cases from the United States Court of Appeals for the Fifth Circuit and the Supreme Court of South Dakota would advance the resolution of the issues raised by the Secretary of Labor's interpretation of FUTA. Unlike the case from South Dakota, the case from the Fifth Circuit presents a comprehensive stipulated record setting forth key facts regarding school systems of three major church groups. This record would greatly assist in the analysis of the statutory and constitutional questions presented in these cases. Moreover, the Secretary of Labor participated directly in the Fifth Circuit proceedings under the special procedures set forth in FUTA and issued a formal decision embodying the agency's interpretation of the relevant statutory provisions. The South Dakota decision actually construed a provision of state law modeled upon FUTA, and the Secretary neither participated nor issued a decision in the South Dakota proceedings. Thus, consolidation of the cases for review would bring the Secretary of Labor as a party before the Court to defend the agency's ruling.

Finally, the United States Court of Appeals for the Fifth Circuit and the Supreme Court of South Dakota relied on different subsections of the relevant section of FUTA in ruling upon the Secretary of Labor's interpretation respecting coverage of employees in church elementary and secondary schools. Review of both cases together on the merits would thus provide the Court with a fuller basis for interpreting the applicable statutory provisions.

For the foregoing reasons, the States of Alabama and Nevada respectfully request the Court to consolidate this case for review with *St. Martin Evangelical Lutheran Church, et al.* v. *State of South Dakota*, No. 80-120.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Response of States of Alabama and Nevada in Support of Petition for a Writ of Certiorari and Motion of States of Alabama and Nevada for Consolidation with No. 80-120 were served this 9th day of December, 1980, by hand on Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for Secretary of Labor Ray Marshall; and by mail, postage prepaid, on Edward Thomas Schilling, Esq., 757 North Broadway, Suite 500, Milwaukee, Wisconsin 53202, counsel for Petitioners in No. 80-120; and Judith A. Atkinson, Esq., Assistant Attorney General, Office of Attorney General, State Capitol, Pierre, South Dakota 57501, counsel for Respondent in No. 80-120.

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